

#### Members

Sen. Vi Simpson, Chairperson  
Sen. Kent Adams  
Sen. Glenn Howard  
Rep. David Wolkins  
Michael Frey  
Patrick Bennet  
Greg Quartucci  
Randy Edgemon  
Vince Griffin  
Michael Sandefur  
Dan Willard  
David Hatchett  
Larry Smith  
Tim Method  
Travis Worl  
Bill Beranek  
Bill Hayden  
Michael Carnahan  
Cliff Duggan  
Tim Maloney  
Michael Brown  
David Lamm  
Rae Schnapp  
Tanya Galbraith  
Alice Schloss



## **WETLANDS SUBCOMMITTEE OF THE ENVIRONMENTAL QUALITY SERVICE COUNCIL**

*Legislative Services Agency*  
**200 West Washington Street, Suite 301**  
**Indianapolis, Indiana 46204-2789**  
**Tel: (317) 232-9588 Fax: (317) 232-2554**

#### LSA Staff:

*Bernadette Bartlett, Fiscal Analyst for the Council*  
*Robert Bond, Attorney for the Council*  
*Timothy Tyler, Attorney for the Council*

Authority: P.L. 248-1996 (SEA 138)

### **MEETING MINUTES<sup>1</sup>**

**Meeting Date:** October 30, 2000  
**Meeting Time:** 1:30 p.m.  
**Meeting Place:** Governmental Center South, 302 W.  
Washington St., Training Room 8  
**Meeting City:** Indianapolis, Indiana  
**Meeting Number:** 5

**Members Present:** Sen. Vi Simpson, Chair; Sen. Kent Adams; Randy Edgemon; Alice Schloss.

**Members Absent:** Sen. Glenn Howard; Rep. David Wolkins; Rep. Ron Herrell; Rep. Richard Mangus; Michael Carnahan.

**Call to Order.** Sen. Vi Simpson, Chair of the Wetlands Subcommittee, called the meeting to order. Sen. Simpson explained that the purpose of the meeting was to discuss the recommendations that the subcommittee would like to make to the Environmental Quality Service Council (EQSC). A copy of a draft of the subcommittee final report was distributed. (See Exhibit 1.)

**Testimony Pertaining to the Economic Impact of Wetland Regulation.** George Smolka, who was unable to attend the previous meeting, presented research findings pertaining to the economic impact of destroying wetlands. Wetlands play a large role in removing pollutions. He noted that confined feeding operations represent one of the largest dangers to waterways in the state. In North Carolina, the disbursement of the content of lagoons during the floods resulted in enormous pollution and costs. He

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<sup>1</sup> Exhibits and other materials referenced in these minutes can be inspected and copied in the Legislative Information Center in Room 230 of the State House in Indianapolis, Indiana. Requests for copies may be mailed to the Legislative Information Center, Legislative Services Agency, 200 West Washington Street, Indianapolis, IN 46204-2789. A fee of \$0.15 per page and mailing costs will be charged for copies. These minutes are also available on the Internet at the General Assembly homepage. The URL address of the General Assembly homepage is <http://www.ai.org/legislative/>. No fee is charged for viewing, downloading, or printing minutes from the Internet.

presented costs associated with standard water treatment systems compared to the costs of maintaining or reconstructing a wetland. Generally, the costs of reconstructing a wetland are 20% to 50% lower. Wetlands were more cost effective and required no maintenance. Existing wetlands were also far less expensive structures to use for water retention. The Indian River Lagoon in Florida performed functions comparable to a constructed water handling systems that would cost \$2.7 million. Maintenance costs would run about \$29,000 per year. If water treatment facilities fail, and people are forced to rely on bottled water, the costs to the public would be tremendous. The perception is that wetlands are useless. Many recent studies document wetlands use in remediating waters containing heavy metals such as lead and mercury that are difficult to remove. Research from around the world has documented the use of wetlands as an effective pollution removal mechanism. In Montana, a researcher has used wetlands for the treatment of acid mine drainage. The impact of destroying wetlands would be enormous. (See Exhibit 2.)

**Subcommittee Recommendations.** The subcommittee considered the following recommendations pertaining to wetland water quality standards, mitigation, and others miscellaneous issues.

### **Recommendations Pertaining to Water Quality Standards.**

***1. The EQSC recommends that IDEM work with USEPA to determine if accommodations can be made in the draft wetland water quality standards to address “non-human” or “natural” sources of E. coli that may occur in wetlands due to the presence of ducks, geese, and other wildlife.***

The EPA requires the state to consider E-coli; however, the first recommendation is to have IDEM review this requirement with EPA to see if there is a way that IDEM can write the rules to exclude non-human or naturally occurring E-coli. Dr. Smolka noted that pathogenic E-coli are by far the smaller set of strains that occur. In most instances of E-coli is more or less innocuous with some exceptions. Dr. Dennis Clark, IDEM, indicated that there would be a conference early next year in which other indicator mechanisms would be discussed. Fred Andes, Barnes & Thornburg, expressed concerns about the scientific uncertainties. He asked if the applicant would have to prove that certain amounts of E-coli were naturally occurring. Sandy Wilmore, Save the Dunes, noted that IDEM would have to prove that the E-coli was naturally occurring. Dr. Clark indicated that EPA appears to be standing behind current E-coli numbers and current requirements using E-coli as appropriate in detecting human health concerns. IDEM would have to conduct a study to determine that the bacteria was arising from either human or natural sources.

***2. The EQSC recommends that IDEM evaluate comments presented at the Water Pollution Control Board hearing or EQSC subcommittee meetings and make revisions to the draft rules as needed to clarify certain definitions and requirements, correct errors, and insure that the draft rules are consistent with other rules and regulations, such as the drainage code.***

The second recommendation pertaining to water quality standards concerned clarifying definitions and making sure that there was consistency in the rule and consistency with other rules and statutes. Bill Hayden, Sierra Club and the Izaak Walton League, noted that the drainage code was not consistent with the Clean Water Act. Sen. Simpson recommended that the code and rules be consistent with the Clean Water Act.

***3. The EQSC supports IDEM’s decision to remove language from the draft wetland water quality standards that would have called for the designation of a wetland as a Tier II wetland based on the presence of:***

- A) a wetland-dependent threatened or endangered species, or***
- B) the proximity of such a wetland to another wetland.***

The third recommendation would remove the endangered species requirement for a Tier II wetland. Andrew Pelloso, IDEM, indicated that there are still provisions within the rule that would allow the agency to consider the impact on endangered species. Many endangered species are in Tier II areas. Dr. Smolka objected to the recommendation because wetlands have already been destroyed to a great extent. A significant portion of the remaining wetlands contain threatened or endangered species. Small puddles may be the last remaining refuge for many organisms. Destroying any more wetlands would be an enormous mistake. Any further destruction would represent laziness or stupidity on the part of the people who want to destroy them. Further destruction of wetlands in northern Indiana is simply not warranted.

Tim Maloney, Hoosier Environmental Council, also objected to the change. He noted that to protect rare or endangered species, the habitat of the species must be protected. He argued other laws do not clearly prevent harm to an endangered species' habitat.

Mr. Hayden also objected to the recommendation. He suggested requiring that IDEM at least consider whether the presence of certain species should make a wetland a Tier II wetland on a case by case basis. Mr. Pelloso stated that there are provisions within the anti-degradation procedures that allow the agency to consider factors such as endangered species. Water quality standards are not solely numeric, and consider physical, chemical, and biological properties of an area. An impact to the area that would affect the endangered species could also impact the water quality.

Patrick Bennet, Indiana Manufacturers' Association, mention an instance wherein endangered species lived in roadside ditches. Roadside ditches would then qualify as Tier II wetlands, and he didn't think that IDEM would be interested in regulating roadside ditches. Indiana has a responsibility to protect threatened and endangered species whether or not it is represented in the rule. His association objects to the automatic upgrading of a wetland to a Tier II wetland if an endangered species is present because a higher level of protection would be required.

Dr. Smolka indicated that wetlands are delineated without the use of zoological criteria. The proposed inclusion of endangered species is a step in the right direction to consider zoological criteria. If the delineation process does not require the examination of zoological components, zoological components will not be considered. Even if endangered species live in a ditch, if they are threatened or endangered they need protection and their presence increase the value of the roadside ditch. The appearance of a wetland is not a good measure of the usefulness of the wetland.

Mr. Mahoney noted that the presence of threatened or endangered species does not necessarily result in an automatic Tier II classification. Habitat must also be present.

Jim Davis, Waste Management, said that consideration of endangered species is part of the Corps of Engineers permitting process. Species are considered if they are within a half-mile of two-tenths of an acre of wetlands. He was concerned that a developer might not have access to the surrounding area within the half-mile radius. A migratory species could visit the site on a temporary basis. There are some wetlands that development will be unable to avoid.

Mr. Hayden suggested that up-front mitigation could be required of Tier II wetlands. If endangered species are involved and there is no up-front mitigation, the species could be eliminated.

## **Recommendations Pertaining to Mitigation.**

***4. The EQSC supports IDEM's decision to remove language from the draft wetland water quality standards that would have allowed the Commissioner of IDEM to require up-front mitigation of Tier I wetlands.***

Mr. Bennet supported the recommendation. Dr. Smolka objected to it, citing IDEM's poor record with

respect to compliance and effectiveness. Regulations could encourage research to develop successful wetlands replacement. Mr. Hayden suggested that if an entity is given five years to make the replacement wetland work, they should be required to have five times as many acres of wetlands. One-to-one mitigation could be allowed in the case of up-front mitigation. IDEM and the applicant should be able to negotiate. Mr. Andes stated that up-front mitigation should not be required of Tier I or Tier II. However, Tier II wetlands could be addressed using ratios. Mr. Mahoney pointed out that the language is not mandatory. The Commissioner “may” require up-front mitigation.

***5. The EQSC recommends that IDEM become a signatory to a revised version of the Interagency Coordination Agreement on Mitigation Banking that addresses IDEM’s concerns with the present Agreement and then implement a mitigation banking program.***

Matt Rueff, Assistant Commissioner, IDEM Office of Water Management, indicated that the agreement is evolving. Mr. Pelloso indicated that the agreement will include all the details pertaining to mitigation banking. Mr. Hayden suggested that mitigation banking could improve compliance. Mr. Andes agreed that banking should be encouraged. He was concerned about when the public would get a chance to comment on the agreement. Mr. Rueff indicated that IDEM will make the agreement available for public comment in the near future.

Dr. Smolka asked if anyone had considered the economic impact on the state if all projects were disallowed. Economic projects should not be considered “sacred cows.”

Mr. Bennett approved of mitigation banking because it allows the project to proceed. He suggested that performance bonding might be useful. Rick Wajda, Indiana Builders, indicated that mitigation banking might be a step in the right direction. Mr. Pelloso indicated that IDEM has made no statement in the rule as to whether a wetland can or cannot be replaced. The position of the agency is that up-front mitigation would allow applicants to prove that they can replace the wetland. No wetlands would be excluded from consideration of mitigation.

***6. The EQSC recommends that IDEM develop and implement a program to regularly inspect and monitor wetland mitigation sites to insure compliance.***

Mr. Hayden suggested that the language be strengthened to say that the EQSC recommends that the Legislature require IDEM to immediately develop and implement a program to regularly inspect and monitor wetland mitigation sites to insure compliance and that it be done without impacting other programs.

Mr. Wajda noted that it should be completed mitigation sites. Mr. Davis noted that five agencies are involved in the permitting process which suggests the difficulty involved. Sen. Simpson noted that several years ago an attempt was made consolidate the function but it received little support. Dr. Smolka suggested that a partnering system be set up so that the responsibility fall at least equally on IDEM and the developer to monitor and gather data.

**Miscellaneous Recommendations.**

***7. The EQSC recommends that IDEM work with the Department of Natural Resources and other agencies to prepare a report that assesses the scope and associated costs of conducting a wetland inventory for the state of Indiana and report it findings to the EQSC.***

Attached to the recommendation was a bill draft. (See Exhibit 2.) Mr. Hayden suggested that the inventory be done periodically, as in every five years, as opposed to just once. Sen Simpson suggested

that the bill draft be changed to require the inventory so that IDEM would need to provide a fiscal impact on costs. Funding could be set aside in the budget. The bill also renews the EQSC for two years.

Dr. Barenek suggested that the proposal be divided into two phases. The first phase would consider costs to identify Tier II wetlands. The second phase would identify remaining wetlands. Dr. Willard suggested that it might be more efficient to inventory all wetlands. Dr. Smolka recommended that a zoological component be added so that the state can begin to look at the complexities of the wetland systems. Mr. Pelloso stated that a wetland inventory of any type could use aerial photography which is less expensive and focuses on wetlands that the lens can pick up. A zoological component would be more labor intensive and would require site visits. Statistical sampling could be used. Other states have conducted remote sensing studies to verify the sites. Some wetlands would not be readily visible.

***8. The EQSC recommends that IDEM develop language in the Section 401 Water Quality Certification regulation that sets forth a review period of less than one year (perhaps 120 days) from the receipt of a completed application.***

There were a lot of complaints about the process taking a year. IDEM believes that 120 would be reasonable. Suggestion were made to make permits concurrent.

### **Additional Recommendations.**

***Performance Bonding.*** Sen. Simpson raised two other issues. First, the creation of a performance bond system in lieu of up-front mitigation. Mr. Pelloso clarified that performance bonding is already listed in the 401 water quality certification rule. Ms. Wilmore noted that performance bonding does not address failures to replace the wetland. In performance bonding, mitigation would occur during development and the financial assurance would be lost if the wetland failed. Dr. Willard asked about what would be the bond required for a wetland that has never been replaced before. It could take hundreds of years to see if certain wetlands can be replaced. Sen. Simpson suggested that bonding be an option. IDEM noted their concern that if a large bond was set and the project fails, IDEM would be concerned about using the large bond to build something that has already failed. In essence, someone has bought and destroyed the wetlands. Dr. Smolka noted that as the success rate grows, performance bonding may be useful down the road. Currently, the use of bonds could be dangerous because some wetlands can not be replaced.

***Certification of Professionals to Conduct Wetland Mitigation.*** The second recommendation was to establish a program to certify professionals to conduct wetland mitigation. Mr. Bennett indicated that his association would like to participate in discussions on the issue. Mr. Hayden noted that soil scientists have been trying to be certified for the past five years. Mr. Wajda noted that in his organization several wetland specialists are recommended by their reputations. Mr. Pelloso stated that it would be beneficial to IDEM to know that certain professionals have been identified who meet minimum standards.

**Subcommittee Recommendations.** Recommendation three, pertaining to endangered species, was deleted from the list. The remaining seven recommendations plus an IDEM option to create a performance bond system in lieu of mitigation was submitted for the subcommittee's approval. Mr. Randy Edgemon moved that the subcommittee recommend the revised list. Sen. Adams seconded the motion. The subcommittee voted four to zero to recommend that list of recommendations as revised. Sen. Adams moved that the subcommittee adopt the final report with the revised list of recommendations. Mr. Edgemon seconded the motion. The subcommittee

voted four to zero to adopt the report.

The proposed bill draft (Exhibit 2) was going to be changed for presentation to the EQSC. The draft will be changed to require IDEM to conduct the inventory. The draft will include an appropriation. No vote was taken on the proposal.

**Adjournment.** The subcommittee was adjourned at approximately 3:45 p.m.